

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Application of)
)
U.S. South Communications, Inc.,)
d/b/a US South and d/b/a INCOMM)
and First Data Corporation)
)
For a Declaratory Order, for Waiver,)
Or in the Alternative, for Approval)
Of an Indirect Transfer of Control)
Of U.S. South Communications, Inc.)
To First Data Corporation.)
_____)

DOCKET NO. 2008-0108

DECISION AND ORDER

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DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

PUBLIC UTILITIES
COMMISSION

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FILED

OF THE STATE OF HAWAII

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To First Data Corporation.)
)

Docket No. 2008-0108

DECISION AND ORDER

By this Decision and Order, the commission waives the requirements of HRS §§ 269-7(a), 269-19 and Hawaii Administrative Rules ("HAR") §§ 6-61-101 and 6-61-105, to the extent applicable, with respect to U.S. SOUTH COMMUNICATIONS, INC., d/b/a US SOUTH and d/b/a INCOMM ("U.S. SOUTH") and FIRST DATA CORPORATION's ("First Data"), (collectively, "Applicants") request to approve the indirect transfer of control of U.S. South to First Data ("Proposed Transaction").

I.

Background

A.

Description of Subject Entities

U.S. South, a Georgia corporation, is authorized to provide intrastate long distance telecommunications resale services in the State of Hawaii ("Hawaii"), pursuant to

Decision and Order No. 14997, filed on September 13, 1996, in Docket No. 96-0264.¹ Applicants state that U.S. South has approximately one customer in Hawaii.² U.S. South is a wholly owned subsidiary of inComm Holdings, Inc. ("inComm").³ Pursuant to the Proposed Transaction, inComm will become a wholly owned subsidiary of First Data Merchant Services Corporation, an indirect wholly owned subsidiary of First Data.⁴

Applicants state that First Data is a "leading provider of electronic commerce and payment solutions for businesses worldwide."⁵ First Data's services include merchant transaction processing, credit, debit, private-label, gift, payroll and other prepaid card offerings, fraud protection and authentication solutions, receivables management.⁶ First Data wholly owns First Data Merchant Services Corporation, a Florida corporation.⁷ First Data is indirectly owned and controlled by New Omaha Holdings L.P. ("New Omaha Holdings"), a Delaware limited partnership.⁸ It has one general partner, New Omaha Holdings LLC, which was formed in Delaware solely for the purpose of

¹Application, at 6.

²Application, at 6.

³Application, at 3 and 5.

⁴Application, at 3-4.

⁵Application, at 6.

⁶Application, at 6-7.

⁷Application, at 3.

⁸Application, at 4.

effecting the acquisition of First Data and managing New Omaha Holdings.⁹ New Omaha Holdings is owned by KKR 2006 Fund, L.P. ("2006 Fund").

The 2006 Fund is a Delaware limited partnership formed and managed by Kohlberg Kravis Roberts & Co., L.P. ("KKR").¹⁰ KKR, headquartered in New York, New York, is a private equity firm specializing in management buyouts.¹¹ First Data and New Omaha Holdings are affiliated with KKR through common individuals who are members of both the general partner of KKR and KKR 2006 GP LLC, a Delaware limited liability company which controls the general partner of 2006 Fund.¹² KKR does not own any voting shares or equity in First Data or any of the entities that control First Data.¹³

B.

Application

On June 5, 2008, Applicants filed a joint application ("Application") requesting that the commission issue an order waiving commission review and approval as necessary to enable the Applicants to consummate certain transactions whereby First Data will indirectly acquire control of U.S. South. In the alternative, Applicants request commission approval of

⁹Application, at 4.

¹⁰Application, at 4.

¹¹Application, at 4.

¹²Application, at 4.

¹³Application, at 4.

the Proposed Transaction.¹⁴ Pursuant to the Proposed Transaction, inComm, and therefore U.S. South as a wholly owned subsidiary of inComm, will become wholly owned subsidiaries of First Data Merchant Services Corporation, an indirect wholly owned subsidiary of First Data.¹⁵ Applicants state that after the transaction, U.S. South will provide the same products and services as it does at present, at the same rates, on the same terms and conditions, and without changes to any billing protocol.¹⁶ Applicants state that there will be no changes to any U.S. South tariff, contract or other service arrangement as a result of this transaction.¹⁷

In support of the Proposed Transaction, Applicants state that U.S. South provides intrastate long distance telecommunications resale services in Hawaii, which are competitive.¹⁸ First Data does not provide any telecommunications services in Hawaii.¹⁹ Also, U.S. South is a non-dominant carrier in Hawaii.²⁰ Applicants state that the Proposed Transaction is consistent with the public interest since U.S. South will

¹⁴In the title of the Application, Applicants request a declaratory order, but fail to include anywhere in body of the Application any request for declaratory relief. Accordingly, the commission does not construe the Application as one for declaratory relief.

¹⁵Application, at 3-4.

¹⁶Application, at 5.

¹⁷Application, at 5.

¹⁸Application, at 8.

¹⁹Application, at 8.

²⁰Application, at 8.

"continue to provide high-quality telecommunications services to consumers, while gaining critically important access to the additional resources and operational expertise of First Data."²¹ Applicants provide biographies of First Data's managerial personnel in support of the Application.²² Applicants believe that the transfer of control will make U.S. South a stronger competitor, to the benefit of consumers.²³ Applicants "emphasize that the proposed indirect transfer of control will be seamless and completely transparent to the customers of U.S. South, and in no event will it result in the discontinuance, reduction, loss, or impairment of service to customers."²⁴ Finally, Applicants state that the "existing competitive market for U.S. South's services will continue to protect the public interest after the proposed merger, making [c]ommission 'regulation' of this transaction unnecessary."²⁵

C.

Consumer Advocate's Statement of Position

On June 20, 2008, the Consumer Advocate filed its statement of position ("Statement of Position") informing the commission that it does not object to 1) waiver of the commission's investigatory authority to review the Proposed Transaction,

²¹Application, at 8-9.

²²Application, at Exhibit B.

²³Application, at 9.

²⁴Application, at 9.

²⁵Application, at 9.

- 2) waiver of the commission's approval requirements, or
- 3) commission approval of the Proposed Transaction.

The Consumer Advocate provides:

- U.S. South is one of many resellers and facilities-based providers of telecommunication services authorized to provide service in Hawaii.
- U.S. South is a non-dominant carrier.
- The Proposed Transaction serves the public interest in that (1) the transaction will enhance competition in the Hawaii telecommunications market; (2) the transaction will allow U.S. South to continue to provide high-quality services to customers; (3) the transaction may provide U.S. South increased access to additional corporate resources; and (4) the transaction will be transparent to end user customers.
- Since U.S. South is a non-dominant telecommunications carrier, and with the number of carriers in Hawaii, the Consumer Advocate states that competition should continue to serve the same purpose as public regulation.

Statement of Position, at 4-5.

In addition to the above, the Consumer Advocate states:

In review of the information provided by [Applicants] in the instant filing, the Consumer Advocate finds that First Data has the technical, managerial, and financial qualifications to assume indirect control of U.S. South for the following reasons:

- First Data is a provider of electronic commerce and payment solutions, and operates in 37 countries serving over 5.4 million merchant locations with over 2,000 cards issued.
- First Data had an operating profit of \$685.4 million and total assets of \$52,324.3 million as of October 29, 2005.

- First Data appears to be operated by a qualified management team whose biographies are attached as Exhibit B to the [Application]. In addition, the Consumer Advocate presumes by that [sic] the U.S. South management team will remain unchanged as the [Application] incorporates by reference information concerning U.S. South that was previously submitted to the [c]ommission with its application for initial certification.

Statement of Position, at 7 (footnotes omitted). Moreover, "since U.S. South indicates that it currently only has approximately one (1) customer in Hawaii, the Consumer Advocate finds that the indirect transfer of control will not result in any negative market share impact. "²⁶

II.

Discussion

HRS § 269-16.9 allows the commission to waive regulatory requirements applicable to telecommunications providers if it determines that competition will serve the same purpose as public interest regulation. Specifically, HAR § 6-80-135 permits the commission to waive the applicability of any of the provisions of HRS chapter 269 or any rule, upon a determination that a waiver is in the public interest.

In this docket, the commission finds, at this time, that U.S. South is a non-dominant carrier in the State. The commission also finds that the Proposed Transaction is consistent with the public interest, and that competition, in this instance,

²⁶Statement of Position, at 7-8 (footnote omitted).

will serve the same purpose as public interest regulation. Thus, the commission concludes that the requirements of HRS §§ 269-7(a) and 269-19²⁷ should be waived, to the extent applicable, with regards to the matters in this docket, pursuant to HRS § 269-16.9 and HAR § 6-80-135.²⁸ Similarly, based on these findings and conclusions stated above, the commission will also waive the provisions of HAR §§ 6-61-101 and 6-61-105, to the extent that the Application fails to meet any of these filing requirements.

III.

Orders

THE COMMISSION ORDERS:

1. The requirements of HRS §§ 269-7(a) and 269-19, to the extent applicable, are waived with respect to the Proposed Transaction, described in the Application filed on June 5, 2008.

2. The filing requirements of HAR §§ 6-61-101 and 6-61-105, to the extent applicable, are also waived.

²⁷The Consumer Advocate argued in its Statement of Position that HRS § 269-19 was not applicable to the Proposed Transaction. See Statement of Position, at 6. As the commission has found that a waiver is appropriate, it need not determine the applicability of HRS § 269-19.

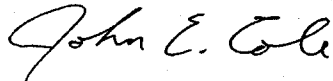
²⁸The commission will continue to examine each application or petition and make determinations on a case-by-case basis as to whether the applicable requirements of HRS §§ 269-7(a) or 269-19 should be waived. Thus, our waiver in this instance should not be construed by any public utility, including Applicant, as a basis for not filing an application or petition regarding similar transactions that fall within the purview of these statutes.


DONE at Honolulu, Hawaii

JUL 21 2008

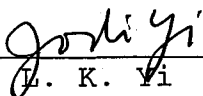
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By: 
Carlito P. Caliboso, Chairman

By: 
John E. Cole, Commissioner

By: 
Leslie H. Kondo, Commissioner

APPROVED AS TO FORM:


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2008-0108.laa

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

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Certificate of Service

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